72 FLRA No. 75

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3954
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
PHOENIX, ARIZONA
(Agency)

0-AR-5623

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DECISION

June 25, 2021

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and James T. Abbott, Members
(Member Abbott concurring)

I. Statement of the Case

Arbitrator Kathy Fragnoli denied the Union's grievance alleging that the Agency violated the Federal Service Labor-Management Relations Statute (the Statute) by refusing to provide the Union access to the Agency's premises and records in response to the Union's information requests. The Union filed exceptions challenging the award on contrary-to-law and essence grounds. Because the Arbitrator erred by finding that the Union could not grieve the alleged violations of the Statute, the award is contrary to law.

II. Background and Arbitrator's Award

As relevant here, in April 2016, the Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act by failing to properly compensate bargaining-unit employees (the portal grievance). In June 2016, the Union submitted to the Agency approximately thirty information requests under § 7114(b)(4) of the Statute[1] for records and also requested access to the Agency's lobby to investigate the portal grievance. The Agency did not respond to the Union's requests for over two years.

In October 2018, after the Agency requested that the arbitrator assigned to hear the portal grievance (Arbitrator Bingham) set a hearing date, the Union advised the arbitrator that the Agency had not responded to the information requests or provided lobby access.

The Union subsequently asked Arbitrator Bingham to "order the Agency to provide the Union with information it has requested prior to scheduling a hearing date."[2] On March 5, 2019, Arbitrator Bingham sent the parties a "scheduling order," which granted the Union access to the Agency's lobby for three days to "observe and gather information in advance of [the] hearing," but did not address the Union's request for records.[3] Thereafter, the Agency again denied the Union's information requests, and asserted that the request for lobby access was mooted by Arbitrator Bingham's order.

On March 12, 2019, the Union filed the grievance at issue in this case (the unfair labor practice (ULP) grievance). The ULP grievance alleged that the Agency violated the Statute[4] and the parties' agreement by refusing the Union access to the lobby and failing to provide records in response to the information requests. The Agency denied the ULP grievance and the Union invoked arbitration.

The Arbitrator denied the ULP grievance on two grounds. First, she concluded that the Union's request for lobby access was "rendered moot by Arbitrator Bingham's evidentiary ruling in the underlying [p]ortal [g]rievance" granting the Union lobby access for three days.[5]

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[1] 5 U.S.C. § 7114(b)(4).
[2] Award at 6 (citation omitted). The Agency responded by asserting that, "[t]o the extent the Union is dissatisfied with [the Agency's] response [to the Union's requests], its remedy is to file [an unfair-labor-practice charge] with the [Federal Labor Relations Authority].'" *Id.*
[3] *Id.* at 7.
[4] 5 U.S.C. §§ 7114(b), 7116(a)(1), (2), (5), (8).
[5] Award at 30.

The Arbitrator further concluded that she lacked jurisdiction over the ULP grievance because it constituted a "collateral attack" on the evidentiary rulings of Arbitrator Bingham.[6] On this point, the Arbitrator explained that the question of whether the Agency's actions violated the Statute "is not proper for deliberation in the instant grievance," which, she found, "consists entirely of the Union's protest of Arbitrator Bingham's evidentiary and procedural rulings" in the portal grievance "for which [Federal Labor Relations Authority (FLRA)] appeal remains the exclusive remedy."[7] And on this basis, she concluded that the ULP grievance constituted an improper "interlocutory appeal" of Arbitrator Bingham's rulings in the portal grievance.[8]

Therefore, she denied the ULP grievance without considering the merits.

The Union filed exceptions to the award on April 23, 2020, and the Agency filed its opposition on May 26, 2020.

III. Analysis and Conclusion: The award is contrary to law.

In its exceptions, the Union challenges both of the Arbitrator's conclusions as contrary to law.[9] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[10] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[11] And in making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[12]

In addressing the Union's arguments, it is important to note that the Authority has consistently held that a union may grieve violations of the Statute.[13] Further, it is well-settled that, in deciding a grievance that involves a ULP, an arbitrator must apply the same standards and burdens that an FLRA administrative law judge (ALJ) applies in a ULP proceeding under § 7118 of the Statute.[14]

Citing this principle, the Union argues that the Arbitrator erred by concluding that the Union's grievance was rendered moot by the evidentiary rulings of Arbitrator Bingham. We agree. In determining whether the ULP grievance was moot, the Arbitrator was required to determine whether the parties no longer have a legally cognizable interest in the dispute's outcome because the Agency demonstrated that: (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.[15]

The Arbitrator, however, did not apply this standard, and instead concluded that the Union's ULP grievance was "rendered moot by Arbitrator Bingham's evidentiary ruling in the underlying [p]ortal [g]rievance."[16] But as the Union correctly asserts, this conclusion ignores that Arbitrator Bingham's ruling did *not* address the Union's claim that the Agency's responses to its requests violated its statutory obligations, because the Union did not raise that claim as part of its portal grievance.[17] And as the Union further

[6] *Id.* at 31 ("Arbitrators have no jurisdiction under the Federal [Service] Labor-Management Relations Statute to review, uphold, reverse[,] or alter the rulings of another arbitrator hearing a grievance between the same parties to a common collecti[ve-]bargaining agreement.").
[7] *Id.* at 32.
[8] *Id.*
[9] Exceptions at 13-14, 16, 19, 22, 24.
[10] *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Ore.*, 68 FLRA 178, 180 (2015).
[11] *Id.* at 180.
[12] *Id.* at 180-81.
[13] *NTEU*, 61 FLRA 729, 732 (2006) (*NTEU*); *see also AFGE, Loc. 3529*, 57 FLRA 464, 465 (2001) (*Local 3529*).
[14] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 174 (2015) (*VA*) (Member Pizzella dissenting on other grounds) (citing *NTEU*, 64 FLRA 833, 837 (2010)) ("Where, as here, a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an [ALJ] in a ULP proceeding under § 7118 of the Statute."); *see also NTEU*, 61 FLRA at 732 (finding that arbitrator erred when he found that he did not have authority to address grievance alleging a ULP and stating that in addressing part of grievance that alleges a ULP, arbitrator must apply same standards and burdens that would be applied by an ALJ); *Local 3529*, 57 FLRA at 465 (if grievance alleges ULP, then arbitrator must apply the same standards and burdens that would be applied by an ALJ in a ULP proceeding under § 7118).
[15] *U.S. Dep't of HUD*, 71 FLRA 616, 618 (2020) (*HUD*) (then-Member DuBester concurring) (citing *U.S. Small Bus. Admin.*, 55 FLRA 179, 183 (1999)); *see also AFGE, Loc. 3230*, 59 FLRA 610, 611-12 (2004) (*Local 3230*) (Member Armendariz dissenting) (ULP grievance does not become moot simply because grievant's file has been expunged of disciplinary action because other remedies remain viable); *U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 52 FLRA 1323, 1336-37 (1997) (*INS*) (citing *DOJ v. FLRA*, 991 F.2d. 285, 289 (5th Cir. 1993)) ("[E]ven when the individual parties resolve the matter that gave rise to the ULP, such cases do not generally become moot because of the potential need for an enforcement decree barring the unfair practice."); *U.S. Dep't of Treasury, IRS, Wash., D.C.*, 39 FLRA 241, 244-45 (1991) (*IRS*) (finding ULP claim concerning agency's refusal to provide requested data not rendered moot by resolution of underlying grievance).
[16] Award at 30.
[17] Exceptions at 21; *see also id.* at 27-28.

argues, its ULP grievance would not have been rendered moot even if Arbitrator Bingham had ordered the Agency to *fully* comply with the Union's requests, because the ULP grievance also sought additional remedies – including a cease and desist order and notice posting – that are particular to ULP violations.[18]

Moreover, the Arbitrator made no finding, nor does the record show, that interim relief or events have completely or irrevocably eradicated the effects of the alleged violation as to the Union's information requests. Therefore, we conclude that the Arbitrator's determination that the ULP grievance is moot is contrary to law.[19]

The Arbitrator also erred by concluding that she lacked jurisdiction to resolve the ULP grievance. As noted, the Arbitrator found that she lacked jurisdiction because the ULP grievance constituted an improper collateral attack on Arbitrator Bingham's evidentiary rulings.[20] But this conclusion ignores the well-established principle that unions can allege ULP violations through the parties' grievance procedure, and that arbitrators deciding such grievances apply the same standards and burdens that an ALJ applies in a ULP proceeding.[21] As such, the Arbitrator was no more obliged to defer to the jurisdiction of Arbitrator Bingham's rulings than would an ALJ adjudicating the Union's ULP claims.

This principle is illustrated by our decision in *DOJ, Federal BOP, U.S. Penitentiary McCreary, Pine Knot, Kentucky & DOJ, Federal BOP, Federal Correctional Complex Coleman, Coleman, Florida* (*BOP*).[22] In *BOP*, a union filed ULP charges with the FLRA's General Counsel after the agency denied its requests for lobby access to investigate two portal grievances at different facilities.[23] Following an evidentiary hearing, the ALJ found that the agency violated § 7116(a)(1) and (5) of the Statute.[24] And upon affirming the ALJ's findings and conclusions, the Authority ordered the agency to grant the union access to the prison lobby, and to cease and desist from violating the Statute.[25]

There was no question in that case that the ALJ had jurisdiction to rule on the union's ULP claims, and that the Authority had jurisdiction to remedy the claims, even where the grievances giving rise to the ULP dispute were pending before an arbitrator. Applying these principles to the instant case, it is clear that the Arbitrator erred by concluding otherwise.

When, as here, an arbitrator erroneously determines that a grievance is not arbitrable, and errs as a matter of law by not addressing the merits of a grievance, the Authority has consistently remanded the award.[26] Therefore, we remand the award to the parties, absent settlement, for submission to an arbitrator of their choice, to resolve the merits of the alleged ULP.

IV. Decision

We set aside the award and remand the matter to the parties consistent with this decision.

[18] *Id.* at 19-20; *HUD*, 71 FLRA at 618 ("The Authority has held that a ULP does not become moot even if the grievant no longer has any complaints regarding the underlying dispute." (citing *INS*, 52 FLRA at 1336-37)); *see, e.g.*, *Local 3230*, 59 FLRA at 611-12; *IRS*, 39 FLRA at 244-45.

[19] Because we have found that the award is contrary to law, we find it unnecessary to address the Union's essence exception. *AFGE, Loc. 2342*, 71 FLRA 692, 693 (2020).

[20] Award at 31-32.

[21] *VA*, 68 FLRA at 174; *NTEU*, 61 FLRA at 732; *Local 3529*, 57 FLRA at 465. There is no allegation that the parties' grievance procedure excluded ULP grievances from the scope of its coverage.

[22] 71 FLRA 538, 538 (2020) (then-Member DuBester concurring) (affirming ALJ decision finding that agency committed a ULP by denying the union's representative access to prison lobby).

[23] *Id.* at 538-39.

[24] *Id.* at 539-40.

[25] *Id.* at 546.

[26] *See, e.g.*, *NTEU*, 61 FLRA at 733; *Local 3230*, 59 FLRA at 612 (citing *AFGE, Loc. 1757*, 58 FLRA 575, 576 (2003) (Chairman Cabaniss concurring in relevant part)).

Member Abbott, concurring:

While I agree that the Union's grievance is arbitrable under the Federal Service Labor-Management Relations Statute (the Statute), I write separately to highlight, once again, the issues that arise when a union is permitted to file multiple grievances that concern the same factual matters and allege similar legal allegations.

As an initial matter, I do not agree with the majority's finding[1] that the instant case is analogous to *DOJ, Federal BOP, U.S. Penitentiary McCreary, Pine Knot, Kentucky & DOJ, Federal BOP, Federal Correctional Complex Coleman, Coleman, Florida* (*BOP*).[2] In *BOP*, the union filed charges alleging that the agency violated the Statute by not permitting union representatives to access prison lobbies for purposes of gathering information for a separate grievance involving alleged Portal-to-Portal Act violations.[3] While the charges and the grievance concerned the same factual circumstances, the charges filed by the Union in *BOP* only concerned access to prison lobbies and the earlier-filed grievance only concerned claims under the Portal-to-Portal Act.[4] Therefore, the charges and the grievance did not advance *any* similar legal allegations.[5]

Here, however, the Arbitrator found that the Union's grievance concerned factual matters and legal allegations that were resolved by another arbitrator in a prior grievance.[6] Specifically, she noted that the Union filed the instant grievance because it claimed that the prior grievance's "ruling to allow Union counsel to observe the shift change for three days was not a sufficient amount of time."[7] Consequently, unlike *BOP*, it is apparent that the Union's grievance concerns the same factual matters and it also alleges similar legal allegations as a prior grievance.

As I have noted before, allowing multiple grievances concerning the same issues—the same factual matters and legal allegations—encourages Unions to engage in forum shopping, to get "two bites at the apple," and to seek different results with identical grievances.[8] Clearly, the Union filed the instant grievance because it was not satisfied with the results of its prior grievance. While the Statute currently permits unions to file multiple grievances that are similar in nature, I applaud the Arbitrator for recognizing that the Union's grievance appears to be improper because it is a collateral attack on the rulings of another grievance.[9] Therefore, I reiterate my call on Congress to revise the Statute to bar unions from filing multiple grievances over the same issues in separate proceedings.

[1] Majority at 5.

[2] 71 FLRA 538, 538 (2020) (then-Member DuBester concurring).

[3] *Id.* at 538-39; *see* 29 U.S.C. §§ 251-262.

[4] *See BOP*, 71 FLRA at 538-39.

[5] *See id.*

[6] Award at 30-32.

[7] *Id.* at 31.

[8] *VBA*, 72 FLRA at 61 (quoting *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 515 (2018) (then-Member DuBester dissenting)).

[9] Award at 31-32.